# THE PRIVILEGE OF WITNESSES IN FEDERAL COURTS AGAINST COMPULSORY SELF-INCRIMINATION.

THE right of a witness, under the Constitution and Laws of the United States, to refuse to give evidence tending to incriminate himself, has recently been passed upon by both the Circuit and the District Court of the United States for the Northern District of Illinois. The question arose, in the course of an investigation by the Federal grand jury into certain alleged offences against the Interstate Commerce Law, in the course of which certain prominent merchants and railroad officials of the city of Chicago, summoned as witnesses before the grand jury, refused to answer certain questions propounded, and refused to produce certain books and papers called for, on the ground that they would criminate, or tend to criminate, themselves by so doing.

The District Court, on the matter being called to its attention, and after argument of counsel in behalf of the witnesses, ruled that the witnesses must give the evidence called for; and, the witnesses still persisting in their refusal, committed them for contempt. The Circuit Court was immediately appealed to to release witnesses on *habeas corpus*, but refused so to do, after full argument and mature deliberation. An appeal has been taken from the decisions of the Circuit Court in the *habeas corpus* cases to the Supreme Court, which appeal is still pending.

The decisions of both Circuit and District Courts were based upon a statute of the United States (R. S. U. S. § 860), which provides that " no pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country, shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States in any criminal proceeding, or for the enforcement of any penalty or forfeiture; provided, that this section shall not exempt any party or witness from prosecution

and punishment for perjury committed in discovering or testifying as aforesaid."

This statute, it was held, abrogated the privilege of witnesses to refuse to furnish self-incriminatory evidence, because it protected the witness from any unfair use against him of the evidence furnished, — that it took away the reason of the privilege, and, with the reason, the privilege itself.

The question raised has never been passed upon by the United States Supreme Court. There are, however, several decisions and dicta of the lower Federal courts, all in accord with the decisions of the Circuit and District Court of the Northern District of Illinois.[1]

In accord, also, are the decisions of various State courts, notably the Courts of Appeals of New York.[2]

In opposition to these cases are the case of Henry Emery, 107 Mass. 172, and a few other State decisions.[3]

As none of these cases are of binding authority upon the Supreme Court, and the question will be considered *rem integram* by that body, it seems that, at this stage, a discussion of the question upon principle is not out of place. In such a discussion, one of the first considerations that arises is, whether there exists in the Federal constitution any sanction or guarantee of the witness' privilege against being compelled to incriminate himself. There appears to be no such guarantee stated in express and unambiguous terms. The provision most closely applicable is one of the clauses of the fifth amendment, which provides that "no person shall be compelled, in any criminal case, to be a witness against himself." This language, in its most obvious interpretation, would seem only to prohibit compelling a defendant in a criminal action to become a witness against himself in such action. Still, by another interpretation, by construing the words "criminal case" as meaning "a matter involving criminal guilt," and the words "to be a witness" as meaning "to furnish evidence," the lan-

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[1] U. S. *v.* Brown, 1 Sawyer, 531; U. S. *v.* McCarthy, 21 Blatch. 470; U. S. *v.* Williams, 15 Int. Rev. Record, 199; *In re* Phillips, 2 Am. L. Times, 154.

[2] People *v.* Hackley, 24 N. Y. 74; People *v.* Sharp, 107 N. Y. 427; La Fontaine *v.* Southern Underwriters, 83 N. Car. 132; State *v.* Quarles, 13 Ark. 307; Kneeland *v.* State, 62 Ga. 395; Higdon *v.* Heard, 14 Ga. 255; Wilkins *v.* Malone, 14 Ind. 153.

[3] Cullen *v.* Commonwealth, 24 Gratt. (Va.) 624; Kendrick *v.* Commonwealth, 78 Va. 490; State *v.* Nowell, 58 N. H. 314; State *v.* Warner, 13 Lea (Tenn.), 52 (opinion of Turney, J.).

guage can be made to cover the privilege of a witness against being compelled to criminate himself, as well as the right of a defendant in a criminal case to refuse to testify in that case. This latter interpretation is the one placed upon the same language in the New York constitution by Judge Denio, in the case of People *v.* Hackley, and it is believed that it is the one the Supreme Court would adopt. The Supreme Court construes the provisions of the Bill of Rights broadly in favor of personal right and liberty.[1]

The Bill of Rights was intended to cover all the principles of personal right established by the common law and the constitutional history of England, and it would certainly be strange if a principle so old, so ingrained in and so characteristic of the common law, as that against compelling self-incriminatory evidence, should not be held to find complete expression and guaranty in some constitutional provision. The provisions above quoted, by the first interpretation, would cover only a special case of the principle prohibiting the compulsion of self-incriminatory evidence; by the last it would cover the entire principle. It is certainly most probable that this latter interpretation is the one the Supreme Court will adopt.[2]

Let us assume, then, that the fifth amendment guarantees the privilege against compulsory self-accusatory evidence. Two questions, then, arise: 1st. Can the privilege so guaranteed be abrogated by statute? 2d. If it can, does the statute in question in fact abrogate it? As to the first question, it seems hard to see how the privilege, if guaranteed by constitutional provision, can be abrogated by statute, unless (as is possible) the privilege and the constitutional guaranty of it cover only the case where the witness runs the risk of punishment for the crime which his evidence would disclose. The weight of authority is that the privilege so guaranteed can be abrogated by statute if the statute affords the witness complete amnesty as to the crime concerning which he was compelled to testify.[3]

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[1] See the Boyd case, 116 U. S., where the majority of the court held that a statute compelling a defendant in a criminal case to produce books, etc., violated the constitutional provision prohibiting unreasonable searches.

[2] In support of this interpretation see People *v.* Hackley, 24 N. Y. 74; Kneeland *v.* State, 62 Ga. 395; State *v.* Quarles, 13 Ark. 307; U. S. *v.* Brown, 1 Sawyer, 531, 537.

[3] Emery's Case, 107 Mass. 172; State *v.* Nowell, 58 N. H. 314; Commonwealth *v.* Kendrick, 78 Va. 490; but see State *v.* Warner, 13 Lea (Tenn.), 52.

It has been held that when the crime has been barred by the Statute of Limitations, witness may be compelled to testify.[1]

So where crime has been pardoned, witness may be compelled to testify.[2]

But if the privilege, though guarded by constitutional sanction, can be abrogated by statute, clearly it can only be abrogated by a statute giving the witness protection at least equal to that afforded by the privilege itself. This brings us to the second question above proposed, Does the statute in question in fact abrogate the privilege as guaranteed by the constitution? What protection does the statute furnish? It provides that the discovery or evidence given by the witness shall not be "given in evidence, or in any manner used against him," in any criminal proceeding. All that this language seems to mean is, that admissions or confessions contained in such discovery or evidence shall not be used against the person furnishing it. It protects the witness from the use of his evidence as an admission in any criminal proceeding against him. It would not prevent sources of evidence disclosed by his evidence from being used against him. For instance, the witness testifies that he, with A, B, and C, committed a murder; that the deed was done with a knife belonging to witness, which he afterward hid in a place which witness describes in his testimony so that the knife can be found. Witness' admissions cannot, under the statute, be used against him on his subsequent indictment and trial for murder; but there is nothing in the statute which would prevent the prosecution from producing the blood-stained knife and proving that it belonged to witness, or from calling A, B, and C to testify as to witness' complicity in the affair. It might, then, easily be that witness would be convicted without the need of his admissions, by evidence the sources of which were pointed out by his evidence. And in such a case the protection of the statute would be of no avail to him. Let us now consider what protection the privilege to refuse to incriminate himself would have afforded witness.

The privilege to refuse to give self-accusatory evidence is very broad. It covers not only the main incriminatory facts, but all minor and subordinate facts, not incriminatory in themselves, but

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[1] Mahanke *v.* Cleland, 76 Iowa, 401; Close *v.* Olney, 1 Denio, 319; Weldon *v.* Bench, 12 Ill. 374. *Contra*, see McFadden *v.* Reynolds, 11 Atl. Rep. 638.

[2] Regina *v.* Boyes, 1 B. & S. 311.

which, in connection with other facts, would incriminate him.[1] It is enough to sustain witness' privilege that the evidence sought would or might tend to incriminate him.[2] And, in general, his mere oath that evidence sought from him would tend to incriminate him is enough to entitle witness to his privilege,[3] subject, according to some authorities, to the right of the court to refuse to allow the privilege in a case where it can see that the evidence sought cannot incriminate the witness.[4] Under these rules it is plain that the witness in the murder case supposed could have refused to give any evidence whatever bearing upon the murder, and that by so refusing he might perhaps have concealed his guilt forever. But if the privilege afforded, or might afford, greater protection to the witness than that provided by the statute, what becomes of the argument that the statute has taken away the reason of the privilege.

The question can be looked at in another and even clearer light. We have seen that the statute simply protects the witness from the use of his evidence as an admission or confession in a subsequent criminal proceeding against him. Now, by the common law, when a witness was compelled against his claim of privilege, properly made, to furnish self-incriminatory evidence, such evidence was not permitted to be used against him as his admissions, on the ground that such admissions were not voluntary.[5] This is precisely the protection afforded by the statute. How can it be claimed that the privilege is abrogated by a statute which affords only the same protection that the law would have

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[1] Wigram, Discovery, p. 63; East India Co. *v.* Campbell, 1 Ves. Sr. 246; Cates *v.* Hardacre, 3 Taunt. 424; People *v.* Mather, 4 Wend. 229; Masters *v.* Prentiss, 2 Jones, Eq. (N. Car.) 62; Wharton, Evidence, sect. 533; State *v.* Edwards, 2 N. & McCord, L. (S. Car.) 13; Poole *v.* Perritt, 1 Spears, L. (S. Car.) 121; *In re* Graham, 8 Ben. 419.

[2] Coburn *v.* Odell, 30 N. H. 540, 555; Janvrin *v.* Scammon, 29 N. H. 280; State *v.* Edwards, 2 N. & McC., L. (S. Car.) 13.

[3] Warner *v.* Lucas, 10 Ohio, 336; Chamberlain *v.* Willson, 12 Vt. 491; 9 Criminal Law Mag. 293, 302, 303; Janvrin *v.* Scammon, 29 N. H. 280; People *v.* Mather, 4 Wend. 229; Poole *v.* Perritt, 1 Spears, Law (S. Car.), 121.

[4] Regina *v.* Boyes, 1 B. & S. 311; People *v.* Mather, 4 Wend. 229; 1 Aaron Burr Trial (Cockroft's edn.), p. 251 *et seq.*; Richmond *v.* State, 2 C. E. Greene (Iowa), 532; People *v.* Smith, 20 Ill. App. 591.

[5] Schœffer *v.* State, 3 Wis. 820; People *v.* Mondon, 103 N. Y. 211; Douglass *v.* Wood, 1 Swan (Tenn.), 391, 395; State *v.* Broughton, 7 Ired. L. (N. Car.) 96, 101; Regina *v.* Garbett, 1 Denison, C. C. 236; Reg. *v.* Coote, L. R. 4 P. C. 599, 607; Whar. Crim. Evid., § 665.

afforded without any statute at all, in case the witness had been compelled to testify against his claim of privilege? [1]

The Emery Case, *supra*, which held that the privilege of a witness against being compelled to incriminate himself could not be removed by a statute merely providing that the testimony of the witness could not be used against him in any subsequent criminal proceeding, professes to distinguish the case of People *v.* Hackley, *supra*, by reason of a difference of the wording in the two State constitutions. The Massachusetts constitution provided expressly that no witness should be compelled to furnish evidence against himself, while the New York constitution had substantially the same provision as that of the Federal constitution above referred to and commented on. But the distinction made seems a very unsubstantial one. The language of the Massachusetts constitution does not, it would seem, include anything more than common-law privilege; nor should the language of the New York Constitution, if it be construed to touch the privilege at all (and it is conceded in the Hackley Case that it should be so construed), include anything less. In truth, the question is one involving important and fundamental principles of personal right, and should be determined by the spirit, not the letter, of constitutional provisions.

The discussion has thus far proceeded on the theory that the statute in question in some way has the effect of compelling a witness to give self-accusatory evidence. It does not in terms purport to do so, and it is not at all easy to see why it should have that effect. It appears on its face merely to prohibit a certain sort of use of evidence when given, and not to relate at all to the compelling of evidence. Apparently the argument by which a provision compelling witnesses to give self-accusatory evidence is read into the statute is about as follows: The general rule is that all witnesses must furnish evidence called for from them. The exception is that they need not criminate themselves. The

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[1] It is interesting to note in this connection that modern English statutes, taking away the right of witness to refuse to give self-accusatory evidence, seem, as far as the writer has been able to ascertain from a hasty investigation, invariably to provide that the witness shall not be tried for the offence to which the testimony relates (see 2 Taylor, Evidence (7th edn.), sect. 1455, and statutes there cited), showing, it would seem, that English constitutional law does not regard prohibiting the use of the evidence as a sufficient substitute for the privilege. See also Emery's Case, 107 Mass. 172; Commonwealth *v.* Cullen, 24 Gratt. (Va.) 624.

statute has removed the reason for the exception, which, therefore, falls, leaving the general rule in force freed from the exception. But such reasoning seems artificial to the last degree in a question of the interpretation of a statute. Heretofore witnesses could not be compelled to give self-incriminatory evidence. It would seem that if the statute had been intended to change the rule, it would have provided in terms that witnesses could be compelled to give such evidence, more especially since the change was in derogation of a well-settled principle of personal right.[1] The statute is susceptible of a perfectly reasonable construction, leaving the privilege intact, viz., of extending to witnesses voluntarily giving self-incriminatory evidence the same protection that the common law afforded a witness compelled to give such evidence on compulsion against his claim of privilege.

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# CONSTITUTIONAL CHECKS UPON MUNICIPAL ENTERPRISE.

"WE have established, we think, beyond cavil," said Judge Miller in Loan Association *v.* Topeka, 20 Wall. 655, 664 (1874), "that there can be no lawful tax which is not laid for a public purpose." This rule possibly narrows the discussion by shifting it from the question what is a lawful tax, to the question what is a public purpose; but the difficulty of application still remains, and is well shown by the case itself which states the rule. That case holds that a law of Kansas authorizing the city of Topeka to encourage by the payment of bounties the establishment of manufactories and "such enterprises as may tend to develop and improve such city," is unconstitutional. Later decisions are to the same effect.[2]

On the other hand, the same court has repeatedly held that

[1] Hare on Discovery, p. 137, citing Orme *v.* Crockford, 13 Price, 376, and other cases.

[2] Parkersburg *v.* Brown, 106 U. S. 487; Cole *v.* LaGrange, 113 U. S. 1.